

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,158

ESTELLE LATTI,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
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Appellant

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

BRIEF FOR APPELLEE

This is an appeal from an order of the District Court for the Northern District of California, Fourth Division, dated March 25, 1965, granting the motion for summary judgment made by the appellee, the Securities and Exchange Commission ("Commission"), which was the plaintiff below.

COUNTERSTATEMENT OF THE CASE

On March 11, 1963, the Commission's complaint was filed and a temporary restraining order was issued (R. 36)^{1/} which continued, with

1/ "R. ____" refers to the transcript of record filed with this Court on June 3, 1965. "D. ____" refers to appellant's deposition. "Br. ____" refers to appellant's brief. "T. ____" refers to the transcript of testimony of L. C. Moore.

the consent of appellant, until April 16, 1963 when a preliminary injunction by consent was entered (R. 37). After the filing of the Commission's amended complaint (R. 7) and appellant's answer consisting of a general denial (R. 14), on July 6, 1964 the Commission moved for summary judgment or in the alternative for an order narrowing the issues (R. 15) and submitted in support thereof various affidavits (R. 1, 4, 18, 21), a transcript of testimony and appellant's deposition. Appellant sought to oppose the Commission's motion (R. 23) and moved for summary judgment in her favor (R. 37) but submitted nothing in support (R. 37). By order dated March 25, 1965 (R. 28), the District Court granted the Commission's motion for summary judgment. Appellant filed a notice of appeal on April 13, 1965 (R. 31). Judgment was entered on April 26, 1965, permanently enjoining appellant from offering for sale or selling to the public in violation of the registration provisions of the Securities Act of 1933 ("Act") certain securities consisting of fractional interests in the proceeds of a purported estate of Mark Hopkins and enjoining her from making any untrue statements or omissions of fact in connection therewith (R. 44-48).

A. Facts:

Appellant claims to be an heir of Mark Hopkins (D. 25, 32-33) who died over 85 years ago. For many years she was engaged, alone and

with others (D. 13-14), in securing powers of attorney from purported heirs of Mark Hopkins which authorized her to act as attorney-in-fact in attempting to recover and arrange a redistribution of the Hopkins estate based upon alleged invalidity of the 1883 decree of distribution (D. 27-28, 89-91). To raise money to conduct litigation to accomplish such a redistribution of the Hopkins estate (D. 45, T. 8), appellant offered for sale and sold (D. 13, 43) to purported heirs of Mark Hopkins and to other persons (D. 43, R. 19, T. 10, 23) instruments entitled "Contract in Event of Recovery" (D. 5, R. 20, T-exhibits 1 through 9, 11 and 12). In addition, appellant has supplied contracts signed in blank (D. 4-5, 8, T. 16) to other people who offered and sold them to the public (D. 16-18, 44-45, 50-58, R. 1-6, 18-19, T. 25-26). Each contract assigned to the purchaser for a consideration of \$100, one per cent of $\frac{1}{5}$ of $\frac{1}{6}$ of $\frac{1}{7}$ interest of the Hopkins estate (R. 20, 39).^{2/} Purchasers of such contracts were to receive a proportionate preference to the purported redistribution of the Hopkins estate (D. 68, T. 50-51) upon appellant's successful conduct of litigation to invalidate the 1883 distribution of the estate.

^{2/} This amounts to a $\frac{1}{21,000}$ th interest in the purported estate (T-exhibit 10).

Appellant has continually represented that the Hopkins estate can be recovered (D. 35-36, 74-77, 89-91, R. 1, 4-5, 18-19, T. 19-20, 56)^{3/} and has concealed from investors the fact that any reasonable expectation of recovering the Hopkins estate was effectively eliminated by the decision of this Court in Latta v. Western Investment Company, 173 F. 2d 99 (C.A. 9, 1949), cert. denied, 337 U.S. 940. That case affirmed the dismissal of an action by this appellant (D. 26-28) and others seeking a decree voiding the 1883 decree of distribution of the Hopkins estate. This Court held that the 1883 decree validly distributed the Hopkins estate and that the claims asserted were barred by the statute of limitations and by gross laches.^{4/}

B. Questions Presented:

This appeal raises only two questions:

- (1) Whether the record shows any genuine issue as to any material fact; and if not
- (2) Whether the Commission was entitled to judgment as a matter of law.

3/ Indeed, even after the entry of the preliminary injunction, appellant conducted a meeting at which she described a suit to recover the estate (R. 18-19).

4/ See also, Freeman v. Hopkins, 32 F. 2d 757 (C.A. 9, 1929) cert. denied, 290 U.S. 535, where it was earlier held that laches barred an attempt to tamper with the distribution of the Hopkins estate.

ARGUMENT

I. The Record Shows That There Is No Genuine Issue As To Any Material Fact.

Viewing the case in a light most favorable to the appellant, the record amply shows that the Commission has met the burden of establishing the absence of any genuine issue as to any material fact and that it is entitled to judgment as a matter of law. At no time during the proceedings below and nowhere in her brief has appellant shown any issue of material fact to be in dispute. The mere assertion that there are disputed issues of fact is, of course, insufficient to defeat summary judgment. Boyce v. Merchants Fire Insurance Co., 204 F. Supp. 311 (D. Conn., 1962) affirmed 308 F. 2d 806 (C.A. 2, 1962).

Although appellant in her brief (Br. 15-18) blandly asserts that "all material facts of this controversy" are disputed,^{5/} it is clear from the record that the following facts — which are the only material facts in the case — are not in dispute:

Appellant offered and sold (D. 13), by herself (D. 13, 43) and supplied to others who sold (D. 16-18, 44-45, 50-58, R. 1-6,

^{5/} Appellant's assertion that disputed facts exist is wholly unsupported. Her attempt to create the illusion of disputed issues of fact in her brief is based upon a few statements taken entirely out of context which relate to immaterial facts and include her own conclusions drawn from her deposition as to the legal consequences of ultimate facts (Br. 15-18).

18-19, T. 25-26), to purported heirs of Mark Hopkins and to other persons (D. 43, 62, 64, R. 19, T. 10, 23)^{6/} a certain "Contract in Event of Recovery" (D. 5-6, R. 20, 39, T-exhibits 1 through 9, 11 and 12) by the use of the mails or the facilities of interstate commerce (D. 53-54, 56-57, R. 4-5, T. 3A-4, 5, 13-14, 38, 40, 43), no registration statement having been filed with the Commission in connection therewith (R. 26); and appellant represented that the purported Hopkins estate could be recovered (D. 35-36, 74-77, R. 1, 4-5, 18-19, T. 19-20, 56) and that she was able to effect such recovery (D. 21, 23-24, 25, 31, 32, 34-35, 91-93, T. 20-21).

The undisputed existence of many of the foregoing facts is established by admissions contained in the appellant's own deposition. Such

6/ Although in her brief (Br. 14, 15, 16) appellant attempts to discredit the affidavit of Cornelia Hopkins (R. 4) and the testimony of L. C. Moore, she admitted in her deposition that each of these people sold contracts signed by her (D. 16-18, 50-58). Moreover, the existence of cancelled checks payable to and endorsed by appellant for contracts sold by L. C. Moore (T-exhibits 4, 5, 6) render frivolous the suggestion that there is any factual dispute as to the relationship between appellant and L. C. Moore.

facts are likewise supported, and the undisputed existence of the remaining facts are amply established, by the affidavits and testimony offered by the Commission in support of its motion for summary judgment.

In concluding that there was no genuine issue as to any material ^{2/} fact, Judge MacBride correctly disregarded any incompetent material

^{2/} Appellant's suggestion (Br. 8-10) that Judge MacBride applied an incorrect standard of proof of the absence of any issue as to any material fact is unfounded. Judge MacBride stated in his Memorandum and Order as follows:

"Due to the fact that the defendant has filed no affidavits in contradiction to those filed by the Securities and Exchange Commission, the only task left for the Court is to examine plaintiff's affidavits and determine whether they contain sufficient evidence to establish a prima facie case for any or all of the counts contained in the complaint. That is, if the facts necessary to establish any of the counts in the Commission's complaint are clearly set forth in its affidavits, then its motion for summary judgment will be granted.

"After a careful examination of the entire record in this case, it is the opinion of this Court that no genuine issue as to any material fact exists. Further, the Court finds that every fact necessary to establish each count of the plaintiff's complaint has been clearly set forth in the affidavits submitted by the Commission. It is thus the decision of this Court that the injunction sought by plaintiff should be granted." (R. 29-30.)

which may have been contained in the Commission's affidavits.^{8/} There is no requirement, as appellant appears to suggest, that the Court specify the portions of the supporting affidavits on which it relies and those portions which are disregarded. Indeed, appellant's assertion that Judge MacBride erred in not making specific rulings on the evidence in the record wholly misconceives the purpose of summary judgment to eliminate

cont'd.

7/ It is obvious from the second paragraph quoted above that Judge MacBride was not referring to the standard of proof of the non-existence of disputed issues of fact, but rather to whether the Commission was entitled to judgment as a matter of law.

Even if, however, appellant's contention were correct, this Court has stated that on appeal of the granting of summary judgment it is not concerned with the reasons of the District Court but only with whether the judgment entered was right. Castner v. First National Bank of Anchorage, 278 F. 2d 376 (C.A. 9, 1960).

8/ See Cromwell v. Hillsborough Township, 149 F. 2d 617 (C.A. 3, 1945) affirmed, 326 U.S. 620; 6 Moore's Federal Practice ¶ 56.22, pp. 2334-2335 (1953). See also, Hoston v. J. R. Watkins Co., 300 F. 2d 869 (C.A. 9, 1962).

the need for a trial and trial-type procedures where there is no genuine issue as to the material facts. Appellant has, in essence and erroneously, attempted in her brief to "cross-examine" the Commission's affidavits (Br. 11-16, appendix). By so doing appellant has sought to raise immaterial issues about details of the manner in which certain affidavits set forth facts that are clearly not in dispute.

I. The Commission is Entitled to Judgment as a Matter of Law.

Judge MacBride found that the "Contract in Event of Recovery" is an investment contract or certificate of interest or participation and hence a security within the meaning of Section 2(1) of the Act, 15 U.S.C. 77b(1), and concluded that appellant was engaged in the offer and sale of unregistered securities in violation of Section 5(a) and (c) of the Act, 15 U.S.C. 77e(a)(c).^{9/}

An investment contract involves a contract, transaction or scheme whereby a person invests money in a common enterprise and is led to expect profits solely from the efforts of others. E.g., Securities and Exchange Commission v. W. J. Howe Co., 328 U.S. 293, 298-99 (1946); Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 385 F. 2d 162, 166-172 (C.A. 9, 1960) cert. denied, 366 U.S. 919. The contracts sold by appellant, which assign fractional interests in the proceeds of the purported Hopkins estate, clearly involve a common

^{9/} The text of Sections 2(1) and 5(a) and (c) is set forth in a statutory appendix.

enterprise. And it is equally clear that any profit to the investor is to come solely from appellant's successful efforts to conduct litigation to recover the Hopkins estate. By her own admission, appellant has spent years of effort on the Hopkins estate (D. 21, 23-24, 25, 31, 32, 34-35, 91-93, T. 20-21)^{10/} and believes that she has the key to invalidating the 1883 decree of distribution of the estate (D. 35, 74-75).

Contrary to appellant's unsupported assertion (Br. 20-21), this case does not involve the collective efforts of a family or group of heirs to recover an estate.^{11/} Contracts have been sold to persons who appellant conceived to be "heirs at law and those that are connected by blood or marriage or an intimate friend"^{12/} (D. 43) located throughout the country (D. 44) who, inter se, are strangers (D. 46-47). However, under appellant's concept, a person can become an heir merely by purchasing a contract (D. 64). In addition, heirs have resold their

10/ Indeed, appellant claims to have dedicated her life to this case (D. 31). She has written a newspaper column about the estate (R. 22d) and even a book (R. 19, 21).

11/ Even if appellant's assertion were correct, it does not necessarily follow that the offer and sale of a security would not be involved.

12/ Although appellant has claimed no exemption from registration under Act for the contracts and the burden of establishing any such exemption would have rested with her, it is clear that the offer and sale of the contracts was a public offering of securities under the Act and that there is no color of any private offering exemption under Section 4(2), 15 U.S.C. 77d.

contracts to other persons who are not heirs (D. 62). Because appellant has obtained powers of attorney from over 500 purported heirs (D. 10, 12),^{13/} the role of such heirs is entirely passive; accordingly, the likelihood of anyone other than appellant being able to take steps to recover the estate is remote, even assuming for purposes of argument that she can do so. Although appellant claims in her brief that redistribution of the estate will be based upon "kinship" (Br. 20), she testified in her deposition that the estate will be redistributed "in proportion to the contracts here to be paid off first as debits (sic), . . . whether they are heirs or not. This is just the same as a note against the estate . . ." (D. 68).^{14/} Unless these contracts convey an interest in the purported estate without regard to any "kinship," their very existence would be a patent fraud. It is clear, therefore, that the terms of the offer, the economic inducements held out to the prospective purchasers, the results dependent upon someone other than the purchaser, and the common enterprise, all combine to make the contracts offered and sold by appellant securities. The Commission is accordingly entitled to judgement as a matter of law that appellant sold such securities without registration in violation of the Act.

3/ There is even testimony that appellant represents all such heirs that could be found (T. 11).

4/ See also T. 50-51.

Judge MacBride also found that appellant misrepresented facts and withheld material facts from investors in violation of Section 17(a) of the Act, 15 U.S.C. 77q (R. 43).^{15/} In particular, appellant represented that the purported Hopkins estate was recoverable without disclosing that the possibility of any such recovery was effectively eliminated by the decision of this Court in Latta v. Western Investment Company,^{16/} supra. Indeed, the mere sale of contracts which attempt to assign an interest in the purported estate, without disclosing that this Court held that the 1883 distribution is valid and that any attempt to set aside that distribution at this time is barred, is inherently

^{15/} The text of Section 17(a) is set forth in the statutory appendix.

^{16/} The decision in the Western Investment Company case is presumed valid and is not open to collateral attack by appellant here. See, e.g., Hill v. United States, 284 F. 2d 754, 756 (C.A. 9, 1960), cert. denied, 365 U.S. 873; Coffman v. Cobra Mfg. Co., 214 F. 2d 489, 491 (C.A. 9, 1954) cert. denied, 348 U.S. 912, reh. denied, 348 U.S. 956. It is nevertheless pointed out that the Western Investment Company case did not involve "probate matters" as appellant suggests (Br. 19), but rather was an action for declaratory relief based upon diversity of citizenship, clearly within the jurisdiction of this Court.

fraudulent and misleading. ^{17/} Compare, Farrell v. United States, 321 F. 2d 409, 418 (C.A. 9, 1963) cert. denied, 375 U.S. 992. In addition, appellant admits that she deliberately concealed from purchasers the intended use of moneys received from the sale of contracts (D. 36). ^{18/} It is thus equally clear that the Commission was entitled to judgment as a matter of law that appellant violated Section 17(a) of the Act.

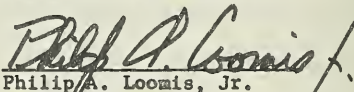
1/ While the honesty of appellant's beliefs might be relevant in a criminal case, it is not germane here, for as the Court has stated, "Section [17(a)] 77q(a)(2) creates a violation if there be proved any untrue statement of a material fact or any omission to state a material fact. . . ." Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 264 F. 2d 199, 210 (C.A. 9, 1959).

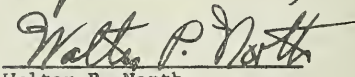
2/ "Q. You never told anyone what this money was to be used for?
A. Never told any of them, because it is none of their business."
(D. 36.)

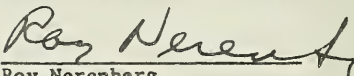
CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,


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Walter P. North
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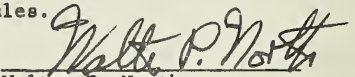

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Walter P. North
Associate General Counsel

APPENDIX

Securities Act of 1933

15 U.S.C. 77b(1)

SEC. 2. When used in this title, unless the context otherwise requires—

(1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. 77d(2)

SEC. 4. The provisions of section 5 shall not apply to—

* * * * *

(2) transactions by an issuer not involving any public offering.

15 U.S.C. 77e(a) & (c)

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;* or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. 77q(a)

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

